Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-957

MRS. WINSTON CALDWELL, Administratrix
and JAMES J. SHANLEY, *Petitioners*

v.

THE UNITED STATES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE SUPREME COURT OF THE UNITED STATES

MRS. WINSTON CALDWELL, Administratrix and JAMES J. SHANLEY, ***Petitioners***

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No. _____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW

The opinion of the Court of Claims is reported at 481 F2d 898; 202 Ct. Cl. 423.

JURISDICTION

The judgement was entered on June 20, 1973. Petitioners' motion for relief from judgement was denied on October 10, 1974. Petitioners' application for an extension of time to file a petition for a writ of certiorari was allowed on January 9, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1255.

QUESTION PRESENTED

Whether Court of Claims Rule 152(b) governing relief from judgement should be applied consistently with Rule 60(b) of the Federal Rules of Civil Procedure?

RULES INVOLVED

Court of Claims Rule 152(b) provides:

> **(b) Mistakes; Inadvertance; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.; Response; Reply:** On motion conforming to Rule 51 and upon such terms as are just, the court may relieve

> a party or his legal representative from a final judgement, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 151(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ....

Rule 60(b) of the Federal Rules of Civil Procedure is is identical to the Court of Claims rule in all of its substantive terms.

STATEMENT

The trial below was concerned with the validity of petitioners' patent for a thermionic converter - an electrical generator which converts heat directly into electricity. The patented device consists of two electrodes which are insulated from each other and spaced 2/100 inch apart, with a vacuum in between.

At the trial of the case in September 1971 the Government placed in evidence documents authored by Dr. Langmuir and Dr. Champeix concerning "space charge" in electron tubes, which suggested that the electrodes of some tubes should be spaced as close together as possible in order to overcome space charge. The Government then presented as an expert witness, an employee of the Atomic Energy Commission who testified that the electrodes of a thermionic converter should also be spaced as close together as possible.

As a result of the Government testimony, the Court of Claims held the patent invalid over the Langmuir and Champeix references. The opinion states:

> "In view of such teachings, **it seems obvious that one would want to place the electrodes as close together as possible without actually touching.**" (481 F 2d 898, 904; 202 Ct. Cl. 423, 434)

In June 1974 petitioners filed a motion for Rule 152(b) relief to permit consideration of Atomic Energy

Commission Report No. TEE 41[illegible] May 1971). This report contains the results of 3[illegible] thermionic converters using varied electrode spacing. The tests reveal that very close electrode spacing caused the electrical voltage of the thermionic converters to drop as much as 73% below the voltage generated using 2/100 inch spacing. Contrary to the Government trial testimony, **the Government document discloses that it is *not* desirable to place the electrodes as close together as possible.**

In October 1974 the Court of Claims denied petitioners' 152(b) motion in a summary order which does not disclose the reason for refusing to consider the Atomic Energy Commission Report.

ARGUMENT

Under Rule 152(b) the Court of Claims judgement should be set aside because AEC Report No. 4125-5 reveals that the testimony of the AEC witness, upon which the judgement depends, was incorrect. It was untrue.

Furthermore, the AEC report, dated May 1971, was in the Government's hands four months prior to the start of the trial, but was not furnished to petitioners during pre-trial discovery. Instead, the Government withheld the report and presented misleading testimony to the trial court.

Court of Claims Rule 152(b) was adopted directly from Federal Civil Rule 60(b) in May 1951 (113 Court of Claims Reports, x-xi). In view of this origin, Rule 152(b) should be construed and applied consistently with Rule 60(b).

Under circumstances substantially parallel to those presented here, the United States Circuit Court of Appeals for the Fifth Circuit affirmed an order granting 60(b) relief:

> "Out of patentee's records, the Williamson June 23, 1959 affidavit was therefor proved to be incorrect. It was untrue. .... But we do not think it shows a deliberate evil purpose to misstate or conceal, or thereafter engage in foot-dragging lest the truth might be discovered.

> **But this does not alter granting 60(b) relief. ....** The effect was the same whether there was evil, innocent or careless purpose. **In either event it was the action of the party while the case was still 'alive' and when had the truth now revealed been known, quite a different result might have come about." (BROS INCORPORATED v W. E. GRACE MANUFACTURING COMPANY,** 351 F2d 208, at 211.)

The Fifth Circuit decision was cited and followed by the Third Circuit in reversing a district court refusal to allow 60(b) relief. The Third Circuit added:

> "It is true, as Webster argues, that relief under 60(b) is discretionary with the district court. But the action of the court is reviewable for abuse of discretion." **(ESTATE OF MURDOCH v COMMONWEALTH OF PENNSYLVANIA, et al.,** 432 F2d 867, at 870.)

In the light of the Third Circuit and Fifth Circuit decisions, the Court of Claims should have granted relief from judgement, and the order denying such relief is reviewable for abuse of discretion.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be allowed.

Respectfully submitted,

FRENCH CALDWELL
Attorney for Petitioners

February 1975

IN THE UNITED STATES COURT OF CLAIMS

No. 326 - 70

MRS. WINSTON CALDWELL, ADMINISTRATRIX, AND JAMES J. SHANLEY

v.

THE UNITED STATES

Before COWEN, **Chief Judge**, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, **Judges.**

ORDER

This case comes before the court on plaintiffs' motion, filed June 13, 1974, for relief from judgment. Upon consideration thereof, together with the opposition thereto, without oral argument,

IT IS ORDERED that plaintiffs' said motion for relief from judgment be and the same is denied.

BY THE COURT

OCT 10 1974

/s/ Wilson Cowen
Chief Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-957

MRS. WINSTON CALDWELL, ADMINISTRATRIX, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1953 Winston Caldwell, deceased, filed a patent application for a "thermionic converter" consisting of two closely-spaced electrodes (an emitter and a collector) spaced approximately 0.02 inches apart with a vacuum between them. By increasing the temperature of the emitter and decreasing the temperature of the collector, electrons are emitted and electrical current generated. With only one prior-art reference cited to the Patent Office, Caldwell's patent application was granted in 1956. In 1960, the patent was reissued on an application filed in 1958 (481 F.2d 898, 899-901 (Ct. Cl.)).

Petitioners filed suit in the Court of Claims against the United States seeking to recover compensation for the alleged unauthorized use by the government of the inventions described in Caldwell's patent. In response the government challenged the validity of the patent on the grounds,

inter alia, that Caldwell's device was both "anticipated" under 35 U.S.C. 102 and "obvious" under 35 U.S.C. 103 from prior-art references at the time of invention. After considering these references, which had not previously been brought to the attention of the Patent Office, the Court of Claims denied petitioners' claim for compensation. The court held that petitioners' patent claims were invalid due to "obviousness" under 35 U.S.C. 103, and therefore found it unnecessary to consider the other defenses raised by the government. 481 F.2d at 899.

After the Court of Claims denied petitioners' motion for rehearing, petitioners filed a petition for a writ of certiorari in this Court, which was denied on April 15, 1974 (416 U.S. 938). Petitioners then filed a motion with the Court of Claims for relief from judgment pursuant to Court of Claims Rule 152(b)[1] which was denied by the Court of Claims on October 10, 1974. Petitioners thereupon filed this second petition for a writ of certiorari.

Petitioners contend that the Court of Claims' denial of their motion for relief from judgment presents the question whether Court of Claims Rule 152(b) should be applied consistently with Rule 60(b) of the Federal Rules of Civil Procedure, to which it is substantively identical (Pet. 1). But Rule 152(b) was not applied inconsistently with Rule 60(b) in the instant case. Both provisions give trial courts substantial discretion in determining whether to relieve a party from a final judgment upon newly discovered evidence or alleged misrepresentation. Nor did the Court of Claims in the instant case abuse its discretion.

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[1]Rule 152(b) of the Rules of the Court of Claims is substantially identical to Rule 60(b) of the Federal Rules of Civil Procedure. Rule 152(b) provides, in pertinent part, that

> * * * On motion * * * and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment * * * for the following reasons: * * * newly discovered evidence * * *; fraud * * * misrepresentation, or other misconduct of an adverse party * * *.

Petitioners allege that the Court of Claims based its holding of invalidity upon the testimony of a government witness who stressed the obviousness of spacing the electrodes as closely together as possible without their touching (Pet. 2), but that an Atomic Energy Commission report, subsequently discovered by petitioners, shows that, to the contrary, electrodes placed too closely together lose voltage. Therefore, according to petitioners, on the basis of this newly discovered evidence, or government misrepresentation, the Court of Claims should have granted their motion for relief from judgment pursuant to Rule 152(b) (Pet. 3).

The Court of Claims, however, did not base its holding upon the testimony of the government witness. Indeed, it relied in large part upon its finding that Caldwell's idea for electrode spacing "came from the prior art of radio tubes" (481 F.2d at 904-905):

> Plaintiffs make much of the fact that the prior art does not expressly teach electrode spacing of 0.02 inches or less, which is the spacing disclosed (but not claimed) by Caldwell. Schlichter, in 1915, taught electrode spacing of about 0.20 inches. Langmuir's work on "space charge" effects in 1923 suggests that electrodes must be closely-spaced in order to get significant current flow. Champeix, in 1951, recognizing the "space charge" problem, taught that the electrodes should be very closely-spaced. In view of such teachings, it seems obvious that one would desire to place the electrodes as close together as possible without actually touching. In any event, it appears that Caldwell's teaching of 0.02 inches electrode spacing is based on the fact that the 35Z5 radio tube, with which he did experimental work, had electrode spacing of 0.015 inches. In early correspondence with his patent attorney, Caldwell suggested a spacing of 0.015

> inches, but later (for unexplained reasons) changed to 0.02 inches. *Caldwell's disclosure of electrode spacing therefore came from the prior art of radio tubes*, and was not based upon any independent finding by Caldwell that such spacing was significant to thermionic conversion. Caldwell taught nothing more than was clearly suggested by the prior art. [Emphasis supplied.]

The Court of Claims did not, therefore, abuse its discretion in denying petitioners' motion for relief from judgment, since the evidence contained in the Atomic Energy Commission report would not necessarily have altered the court's holding.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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MEMORANDUM FOR PETITIONERS IN REPLY

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MEMORANDUM FOR PETITIONERS IN REPLY

The petition seeks review of a Court of Claims order which denied petitioners' motion for relief from judgment under Court of Claims Rule 152(b) which is drawn from F.R.C.P. Rule 60(b). (Pet. 1,2; Opp. 2).

Petitioners' 152(b) motion is based upon the facts that a previously withheld Government document reveals that the testimony of the Government's expert witness on a key issue of fact was not correct. It was untrue. (Pet. 2; Opp. 3).

The Government asserts that its misrepresentations should be disregarded because: "The Court of Claims, however, did not base its holding on the testimony of the Government witness." (Opp. 3). The Government presently contends that, instead, the court relied in large part on the fact that Caldwell used radio tube technology as a base from which he developed his electrical generator invention. (An electron tube which converts heat directly into electricity.) This argument ignores the findings of fact which establish that the apparatus disclosed in the patent is not the same as the radio tubes the inventor used for experimental work and demonstrations. (Finding 20, 202 Ct. Cl. 423, at 447). The conflict between the Opinion and the Findings of Fact stands out clearly, and the court most likely considered this inconsistency harmless error.

Nevertheless, the Government contends: (1) the court disregarded the testimony of the expert witness; (2) the court rendered its judgement in a complex patent case

without consideration of the trial record or findings of fact; and (3) therefore (as a result of this unique judicial procedure) "the evidence contained in the Atomic Energy Commission report would not necessarily have altered the court's holding." (Opp. 4).

If the Government scenario is a valid representation of the court's actions, abuse of judicial discretion is established ab initio. Petitioners believe that the court is more likely to have followed established procedures and relied upon the testimony of the Government expert. That testimony has now been discovered to be untrue, and petitioners seek to have the truth considered under the rule providing relief from judgment.

It may be true that the court denied petitioners' motion because consideration of the new evidence and the Government misrepresentations would not necessarily have altered the court's holding; but how can any litigant prove on a motion what will necessarily alter a court's opinion? The rules for relief from judgment do not require the impossible.

The standard applied by the Third and Fifth Circuits for granting 60(b) relief is whether the facts presented by the motion might have altered the judgment, if those facts had been available at the trial. Petitioners clearly meet the reasonable standard applied by the Circuit Courts of Appeals. The Court of Claims order denying relief from judgment is in conflict with the Circuits.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRENCH CALDWELL
Attorney for Petitioners

April 1975